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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 9

SWIFT & COMPANY, INC., and ARMOUR AND COMPANY,
Appellants,

v.

DON J. WICKHAM, Commissioner of Agriculture and Markets of the State of New York,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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In the

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October Term, 1965

No. 9

Swift & Company, Inc. and Armour and Company,

Appellants,

v.

Don J. Wickham, Commissioner of Agriculture and Markets of the State of New York,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

APPELLEE'S BRIEF

Opinion Below

The opinion of the United States District Court for the Southern District of New York (R 376-395) is reported at 230 F. Supp. 389.

Jurisdiction

Appellants have invoked the jurisdiction of this Court under Title 28 U.S.C. §§ 1253 and 2101(b).

Questions Presented

1. Was a substantial constitutional question presented by appellants below so as to require the convening of a Three-Judge District Court pursuant to 28 U.S.C. § 2281, and to authorize a direct appeal to this Court?

2. Does the general scheme of the Poultry Products Inspection Act, 71 Stat. 441-449, 21 U.S.C. §§ 451-469, manifest a clear intention on the part of Congress to prohibit the State of New York from properly exercising its police power to protect its citizens from false and misleading weights on food products?

3. Does New York State's Regulation with respect to net weight requirements, as construed by appellee, violate the commerce clause of the United States Constitution so as to render the Regulation invalid?

4. Does New York State's Regulation, as construed by appellee, deny appellants the due process and equal protection provisions of the Fourteenth Amendment of the United States Constitution?

Statutes and Regulations Involved

Section 193 of the Agriculture and Markets Law of the State of New York; Regulations 221.40 and 221.9(c) of the Department of Agriculture and Markets of the State of New York; the Poultry Products Inspection Act, 71 Stat. 441-449, 21 U.S.C. 451 *et seq.;* 7 C.F.R. Sections 81.1, 81.3, 81.125, 81.127, 81.130. These statutes and regulations are all set forth in the Appendix to Appellants' Brief.

Statement of the Case

Appellants pack and ship frozen stuffed turkeys to the State of New York from their processing plants in Minnesota and Wisconsin (R 48, 90). Upon entry into New York

State they are sold to retailers who in turn offer them for sale to the general public (R 301, 339). The turkeys are labeled at appellants' processing plants outside New York State so as to show only the total weight of the entire stuffed poultry product (R 110-112).

At the present time appellants' federally approved label does not provide for separate statements as to the net weight of the turkey and the combined weight of the stuffed turkey.

The present controversy arises because the appellee Commissioner of Agriculture and Markets of the State of New York has interpreted the term "net weight" as set forth in New York's Agriculture and Markets Law § 193 to require, that stuffed poultry offered for sale in this State must have indicated on a label attached to the poultry package both the "net weight" of the unstuffed poultry and the total "net weight" of the combined product (R 43, 265, 671).

Although appellants' amended complaint thereafter sought to declare unconstitutional the Agriculture and Markets Law § 193, it is appellee's interpretation of the term "net weight" as used in the State statute that is at issue, since both the federal and State statutes *use the term "net weight"*.

Simply stated, this action involves an alleged conflict of the interpretation of the term "net weight" by State and federal officials. Appellants contend that the Poultry Inspection Division of the federal Department of Agriculture which has jurisdiction over the interstate shipment of appellants' stuffed turkeys has interpreted the term "net weight" in the federal statute to mean the total weight of the stuffed turkey including the stuffing and refuses to approve labels which would separately indicate the weight of the turkey and combined weight of the turkey and stuffing. The appellee has construed this language in the

state's statute in its application to the sale of appellants' stuffed turkeys in this State to mean that appellants must separately state the weight of the unstuffed birds and also the total weight of the stuffed birds (R. 221).

The complaint alleged that the federal interpretation preempts appellee's interpretation of the term "net weight" and sought by declaratory judgment to have appellee's application of his weight regulation to appellants' stuffed turkeys shipped in interstate commerce declared invalid and appellee enjoined from interfering with the sale of appellants' stuffed turkeys in New York State. Appellants likewise claimed that appellee's interpretation of his weight regulation violated the commerce and the due process and equal protection provisions of the United States Constitution.

Appellants' motion for the convening of a Three-Judge District Court pursuant to 28 U.S.C. § 2281 was granted. Believing that this case might present a substantial constitutional question, the lower court convened a Three-Judge Court pursuant to 28 U.S.C. 2284. *After trial,* the Three-Judge District Court dismissed the complaint and entered judgment for the appellee.

The Opinion of the Court Below

The Court held that New York's statute and regulations with reference to the sale by net weight of stuffed poultry was not rendered invalid by the commerce clause. Protection of the public against false weights and measures was said by the Court to be a proper exercise of the police power of the State of New York and that a label showing only the total weight of the turkey was not sufficiently informative to consumers. Citing *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345 and *Savage* v. *Jones,* 225 U. S. 501, the Court held that New York's regulation, which does not favor local proc-

essors is not an undue burden simply because it may require out of state manufacturers to alter their process of manufacture. Appellants' claim that the state regulation violated the Fourteenth Amendment was dismissed as being totally lacking in substance.

The Court directed its attention, in detail, to the argument by appellants that the supremacy clause forbids enforcement of New York's regulation. After analyzing the statute in detail, the Court unanimously concluded that the general scheme of the Poultry Products Inspection Act did not reveal a congressional purpose to oust the states of their "historic undertaking to safeguard their people from improper statements of weight".

Appellants' contention that New York's weight regulation frustrated the congressional purpose by impairing the wholesomeness of poultry was rejected as wholly contrary to the evidence, and that mere enactment of the federal poultry inspection statute did not rule out the state requirements as to weight.

The State Regulation, it was held, did not create an irreconcilable conflict between New York's requirements and federal requirements and both are capable of co-existence.

The Court specifically addressed itself to the method whereby appellants obtained approval from the United States Department of Agriculture. It held that where, as here, the statute, § 457(b) and the Regulations, 7 C.F.R., § 81.130(c) provide a procedure whereby review at the administrative level may be obtained, one may not rely upon a letter from a subordinate federal official in order to avoid compliance with state regulations.

Finally, the Court expressed its concern with the question of the propriety of convening a Three-Judge District Court in this case. There was serious doubt in the minds of the Court that a substantial federal constitutional question was presented. In order to avoid the possibility of an in-

valid order it directed that "judgment dismissing the complaint be entered in the name of the three-judge court, at the same time certifying out of abundant caution that Judge Croake individually arrived at the same conclusion" that was reached by the Court collectively.

Trial Summary

The testimony at the trial revealed that both appellants, in preparing frozen stuffed turkeys for sale and distribution, processed them in a similar fashion. In substance, the turkeys are placed on an assembly line arrangement (R 48-54; 91-93) and as each turkey reaches a particular point in the line, an employee by means of a pressure device, stuffs each turkey with a prepared stuffing (R 55; 92). No attempt is made to determine the precise amount of stuffing that is injected into the cavity of each turkey (R 71; 95-99), as each cavity is filled to the limits of its capacity. The turkeys are not weighed prior to stuffing (R 70; 96) and the employee preparing the turkey is not limited or controlled in any way as to the amount of stuffing placed therein (R 71; 96). It is only after the stuffing process is completed that the turkeys are weighed, inspected and labeled (R 52; 79-93).

They are then placed in a plastic wrapper (R 52-53; 93) and six turkeys of various weights are placed in shipping containers (R 53; 93), frozen and stored (R 53; 93). Thereafter, in many cases without specific orders, (R 85) the frozen stuffed turkeys are usually shipped by rail directly to New York State (R 85). After the freight cars arrive, they are routed directly to a warehouse for unloading and storage. The frozen stuffed turkeys are subsequently sold pursuant to orders, to appellants' customers. After reaching the retail store they are removed from the original shipping container and individually offered for sale to the general public.

Attached to the complaint as Exhibits B and C (R 38, 39) are samples of the actual wrappers and labels allegedly approved by the Poultry Division of the United States Department of Agriculture. It is apparent, and must be conceded, that these labels only indicate the total net weight of the stuffed turkeys and fail to inform the public of the actual net weight of the turkey without the stuffing. Since the stuffed turkey is sold by the pound, the consumer is being charged the same price per pound for the stuffing and the turkey. It is obvious that the consumer in many instances is being misled by a label that merely states the *total* net weight of the stuffed turkey.

Appellants allege that pursuant to the regulations promulgated by the Poultry Division of the United States Department of Agriculture, the only label approved by said Division is one containing the total net weight of their frozen stuffed turkeys. Despite this contention there was proof adduced at the trial that the United States Department of Agriculture had earlier approved labels showing *separate* weights of stuffed rock cornish game hen and garnished hams (R 140-153).

The Trial Testimony of Specific Witnesses

The testimony of Charles Atkin (R 48-90), Superintendent of the Turkey Processing Plant of appellant Swift & Company, located at Detroit Lakes, Minnesota, dealt with the method of processing frozen stuffed turkeys for sale and distribution. He testified that the turkeys are brought into the plant, hung on conveyor chains or shackles, dressed, defeathered, eviscerated and then are placed in slush ice and water in a tank where they are chilled overnight. From there they go to the stuffing department and they are then packed in Cryovac bags and frozen (R 48-49).

When the bird is ready for stuffing it is washed thoroughly with sprayers, inspected and the cavity of the bird

is sterilized by pressure and it is then brought to the stuffing machines. The stuffing is injected into the bird by a logger and moisture is added at the time the stuffing is added (R 52). It is then inspected to see that it is not overly stuffed and that the stuffing conforms to the general contour of the bird (R 52).

The bird then is placed on a conveyor and operators put giblets which have been packed in a foil package into the back of the bird, between the wings (R 52). It then goes to a machine which covers it with the Cryovac bag, the air is evacuated, the bird is weighed and placed in a shrinking tank which shrinks the bag that has just been placed upon them (R 53). It is then placed into a liquid freezer for 30 minutes and then goes immediately into a blast freezer (R 53). Under the present process, only one weighing is made after the bird is bagged with the giblets and dressing (R 57).

The witness testified that random tests are made to determine the kind of stuffing being inserted into the turkey be selecting a bird after it has been stuffed, taking it to the laboratory, removing the dressing and figuring the percentage of the dressing in the bird (R 58). There is a variance in the amount of stuffing that goes into the bird depending on the conformation of the bird and its cavity (R 59).

This witness described the activities of the U.S.D.A. inspectors in the plant, i.e., inspecting the plant, the machinery, and bag operation and the stuffing operation for sanitary purposes. This inspection is not done on any particular schedule, but every hour or two as the birds come off the line (R 59-60).

On cross examination Mr. Atkin testified that after the bird comes out of the ice water (R 67), it is drained by hanging the bird on the drain line. This takes approximately 6 to 8 minutes before it goes to an operator for stuff-

ing. The stuffing is injected into the bird by a machine which automatically injects a percentage of water into the stuffing. At this point the operator does not know the weight of the bird. The stuffing machine consists of a stainless steel pipe about two inches in circumference activated by a switch which the operator steps on. This lets the water into the dressing and as the stuffing is inserted into the bird, it is stuffed so that the bird retains its natural appearance (R 70-71). The operator does not know how much stuffing goes into the bird; she merely puts the bird on the stuffing horn and as the stuffiing goes into the bird, it pushes itself off the horn so that if more pressure is exerted the turkey would receive more stuffing. A 5 pound bird would receive stuffing in the amount of 16 to 21% of the weight, a little over a pound. However, the machine is not regulated to give a particular percentage of stuffing. It is up to the operator (R 72-73). The stuffing machine ejects the stuffing at a constant rate but the amount of stuffing going into the bird varies depending on how the operator manipulates the bird (R 74).

No attempt was made to weigh the turkey more than once so that the turkey is only weighed after the stuffing, the bag and the giblets are all together (R 79). There was never any attempt, since 1955, when the stuffing operation started, to weigh a bird prior to stuffing nor was any test ever made to determine whether two weights were feasible (R 79-80).

Mr. Atkin stated that under the present processing system it takes 25 to 30 minutes from the time the bird is hung until it goes into the liquid freeze and it remains in the liquid freeze about 30 minutes. The birds are weighed before they are frozen at the rate of about 3 birds per minute (R 81).

After the bird is covered with the Cryovac bag and is sealed with the stuffing and giblets, it is weighed and the scaler marks the weight on the Cryovac bag with an indeli-

ble pencil allowing for the weight of the bag (R 82-83). It then goes into the liquid freeze tank and is frozen and that weight remains on the label until the bird is sold at retail (R 84).

When asked how many weighings would be required to show the net weight of the turkey and the total net weight of the bird including the giblets and stuffing, the witness answered two weighings or one more weighing than is now made (R 87). In connection with the time element involved in this extra weighing Mr. Atkin stated that while "there is a possibility of contamination" any time you handle any food product this was not a serious possibility should there be an extra weighing (R 89).

Mr. Russel Posegate, supervisor of poultry processing for Armour and Company, described the method employed by Armour to process frozen stuffed turkeys in their plant in Barron, Wisconsin (R 90-95).

Basically, the process is substantially the same as that used by Swift & Company. A Moyno Pump, which is a food type pump, is used to pump the stuffing into the bird. The bird is placed over the stainless steel pipe attached to the pump and the pump is controlled by a foot operated electric clutch type switch which starts and stops the pump. The bird is filled by holding it over the pump and as the stuffing is inserted, the bird pushes away from the pump (R 92). Approximately a pound and a half of stuffing goes into a 5 lb. bird and that possibly more stuffing might go into Armour turkey of the same size than the Swift turkey since the capacity of every 5 lb. bird is slightly different.

Any check on overstuffing is determined by those on the assembly line and an appearance check is made before the bird goes into the bag (R 102). It is up to the packer to determine the way he wants the bird packed, whether "solidly" or "lightly" (R 103-104).

Mr. Posegate testified that there is one weighing of the turkeys. They have two scales and the birds are weighed at the rate of a little over 300 an hour. He testified that if another weighing had to be made it would not affect the birds as far as wholesomeness or contamination are concerned (R 106), but that no test had ever been made of double weighing before or after they were stuffed.

William E. Hauver, Deputy Director of the Poultry Division of the Agricultural Marketing Service, U.S.D.A., testified for appellants. The poultry division is responsible for enforcement of the Poultry Products Inspection Act, and as Deputy Director Mr. Hauver coordinates and services the poultry inspection services.

He testified that the Poultry Products Inspection Act was designed as a consumer protective measure and is concerned with the wholesomeness of poultry (R 109). He described the process of obtaining U.S.D.A. approval of a label on a poultry product as follows: The applicant submits a proposed label, either an artists' sketch or a photo. It is reviewed by the Food Products Section and commented on either favorably or there might be some suggestion for some changes in the label prior to its approval. If there is an unfavorable comment a letter is sent to the applicant explaining why the label does not conform and suggestions are sometimes made to correct the objection. Final approval must be obtained before it can be used (R 110).

The witness testified that in looking at the label to determine whether it gets Department approval they look to see that it contains the necessary information stipulated in the law and look to see whether it contains false or misleading information. If a product is composed of several ingredients they look for the ingredient statement, the formulation, the method of processing, preparation of the product and if that is all in order they approve the label

(R 113). The purpose of formulation, examination and ingredient examination is quality, wholesomeness and prevention of adulteration (R 113).

The witness testified that the Swift label was not approved because:

> "The net weight shown in the manner proposed would be confusing to the consumer. Furthermore, this type of net weight duplication would require two weighings. The initial weight of the turkey would have to be kept on turkey until it was stuffed, packaged and reweighed. The confusion which might result from such a procedure could result in improper weights being shown on the product." (R 114)

A letter from Dr. Robert J. Lee, head of the Poultry Product Section, who handles label approvals, addressed to Swift & Company explained that the label was rejected because the U.S.D.A. does not allow dual weights because of the impracticability of checking on it accurately (R 115).

The application by Armour and Company for approval of a label showing two weights was also disapproved by the Department (R 116). Mr. Hauver testified that it is the policy of the Department to permit only a single net weight on any combination poultry product.

Evidence was adduced that the Department had given temporary approval to a label showing dual weights with respect to cornish game hen, submitted by Idlewild Farms in Connecticut (R 118). The witness testified that the Department would not permit a retailer in New York State to add to the label showing one weight an additional weight, namely that of the turkey. Judge Croake asked whether there was any procedure for appeal within the Department and the witness answered yes but that no such appeal was taken in this case (R 121).

When questioned as to what was wrong with double weighing, the witness testified that there are too many opportunities for confusion and mixups in carrying the weight of the raw bird through the entire processing line and the calculations might result in wrong weights being applied but that no test as to this possibility had been made (R 129) nor did the U.S.D.A. ask Swift and Armour to make such a test (R 130).

Mr. Hauver stated net weight was not defined in the regulations or in the Act but is the interpretation of the U.S.D.A. (R 135). No attempt was made by the U.S.D.A. to compromise the difference between the Federal and New York State net weight provisions (R 136), despite the fact that the Act specifies that the U.S.D.A. shall cooperate with State officials in the enforcement of the Poultry Inspection Act (R 136).

This witness testified that perhaps this should have been done but it was not done in this case and that the U.S.D.A. is not interested specifically in declaring the State statute unconstitutional (R 137).

When asked by Judge Friendly, who in the Department participated in the determination to disapprove labels showing separate weights when Armour and Swift submitted them, Mr. Hauver testified that the Food Products Section, Poultry Inspection Branch, the director's office, the witness and the witness' superior and possibly general counsel for the Department. It did not go to the Assistant Secretary or any similar level (R 167-168).

Judge Friendly then asked why couldn't a tag or something be stuck on the bird at the time it was weighed before stuffing and remain with the bird until the final weighing. The witness stated that if it were securely affixed this is a possibility but there are too many areas where error might develop and it would be hard to check because when you check on the finished product it has to be defrosted to

remove the stuffing and weigh it (R 168). However, the court pointed out that they could weigh the bird before it was frozen and therefore they wouldn't have to defrost it later. The witness stated that it would require a man there all the time just checking the weight. They did not have such staff available (R 169). The witness admitted, in answer to a question, that it might be possible that the Department could decide in the future that two weights might be permissible.

In response to a question by Judge Croake that if the federal regulation was the same as the state, could means be found to protect the consumer, this witness said that if such was the case we would have found the way to check it out to our specification in order to reasonably verify the accuracy of the weight statement.

Prior to 1963, when New York State's weight regulation went into effect, the annual increase in the sale of stuffed turkeys by appellants in New York was as follows (R 216-217):

SWIFT & COMPANY

Stuffed Turkey

1960— 167,000 lbs.
1961— 105,000 lbs.
1962— 142,000 lbs.

ARMOUR & COMPANY

Stuffed Turkey

1960— 269,000 lbs.
1961— 367,000 lbs.
1962— 524,000 lbs.

John F. Madden, Director of the Bureau of Weights and Measures of the Department of Agriculture and Markets

of the State of New York testified on behalf of appellee. Mr. Madden testified that § 221.40 of the Regulations promulgated pursuant to § 193 of the Agriculture and Markets Law requires that the total weight of the turkey and the combined total weights of the product be stated on the label (R 221) and that the local sealers acted on their own in enforcing this separate weight provision (R 223).

On cross-examination Mr. Madden testified that his position as director of Weights and Measures is to make sure that the laws relating to weights and measures are enforced in New York and that his inspectors spot-check weights in various counties to determine whether this is being accomplished (R 224). Section 180 of the Agriculture and Markets Law provides that the Commissioner shall promulgate rules and regulations and issue instructions to county sealers and these shall be binding upon the sealers (R 224).

Whenever a spot-check by Mr. Madden's inspectors reveals that the law is not being enforced in a particular area, the inspectors report this to Mr. Madden who personally confers with the local governing body, submits reports of findings to the body and asks them for cooperation in seeing that the laws are enforced in that jurisdiction (R 225).

Mr. Madden testified that on March 1, 1964 Regulation 221.9(c) became effective. This regulation is similar to 221.40 except that the words "at retail" are omitted (R 226). However, there is no change in the interpretation of the law with respect to stuffed turkeys and the application of single or multiple weights (R 228). The principal change made by the new regulations is that they apply to both retailers and wholesalers.

Although Mr. Madden stated that stuffed turkeys in a frozen state, would have to be thawed first in order to check their weights and that therefore an inspection

is impractical; when questioned further he stated he meant that it would require a little more work in his department and he would therefore need more money in the budget to buy stuffed turkeys in order to inspect them and more men. In that respect his department had the same trouble as the U.S.D.A. (R 237). He stated there is no question that testing can be made to determine the weight of birds and the weight of the stuffing (R 237). Mr. Madden testified that the State would have no objection to having a label on the turkey that would comply with both the state and federal requirements.

Esther E. Hendler, Senior Inspector, New York City Bureau of Weights and Measures, Department of Markets testified on behalf of the appellee. Mrs. Hendler is assigned to a special investigative squad of consumer frauds in relation to weights and measures and misleading advertising. She made a complaint against Swift & Company and a retailer—Trunz—in 1962, resulting in a criminal conviction for violation of the N. Y. State Regulation with respect to frozen stuffed turkeys (R 241-242).

She stated that an advertisement appeared in a New York daily newspaper on or about April 18, 1962 advertising stuffed Butter Ball Swift turkeys at 39¢ a pound (R 241). She went into one of the retail stores to check on the weight and there was no separate weight stated on the turkey with respect to the stuffing and the net weight of the bird.

She purchased two stuffed turkeys, one of which was a Swift turkey marked 7 lbs. 4 oz. including dressing. One was labeled 7 lbs. 9 oz. One turkey was left as is and the one marked 7 lbs. 4 oz. was examined back at her department (R 242). Upon examination, she testified, the bread stuffing enclosed in the turkey weighed 2 lbs. 2 oz. and the turkey itself 5 lbs. 2 oz. She said that at the state criminal trial the defendants there attempted to

prove that poultry was not meat. Both defendants were found guilty of violating the State statute which is enforced in the City of New York by the New York City Bureau of Weights and Measures of the Department of Markets. No appeal was ever taken from that conviction (R 244).

She testified that the bird was packed extremely tight with stuffing and that in her opinion the average housewife would not pack stuffing so tightly and that while the bird contained 2 lbs. 2 oz. of stuffing she claimed that the normal amount should have been about ½ of that.

Summary of Argument

I

Appellee maintains that a three-judge court was improperly convened below and that consequently a direct appeal to this Court was not authorized.

Both the Federal and State enactments upon which the present controversy arises, contain the critical term "net weight." The conflict results only from an alleged difference in interpretation of that term by the State and Federal officers. Clearly, "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or federal law, the three-judge requirement does not become operative." *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 157. Moreover, a claim that a state law is inoperative because of a federal statute which allegedly preempts it does not require the convening of a three-judge court, *Cace* v. *Bowles*, 327 U. S. 92, 97. Further, although a three-judge court may be convened where a non-constitutional claim is joined in the complaint with a valid constitutional contention, *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U. S. 72 the constitutional claim must be a substantial one. *California*

Water Service Co. v. *City of Redding,* 304 U. S. 252, 254. The Court below summarily dismissed as insubstantial appellants' alleged constitutional assertions under the Fourteenth Amendment and the commerce clause. Accordingly, the three-judge court was improperly convened and the direct appeal to this Court should be dismissed.

II

The New York Agriculture and Markets Law is not preempted by the Federal Poultry Products Act. The New York statute, as the Court below found, was enacted for the "protection of the public against false weights and measures . . ." and accordingly was a valid exercise of New York police power in the field of state inspection laws. *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345. The federal statute, on the other hand, is concerned only with the wholesomeness of the poultry product, 21 U.S.C. 451 *et seq.* In the absence of a direct and irreconcilable conflict between fedeal and state statutes preemption does not attach. *Head* v. *New Mexico,* 374 U. S. 424, 430.

Both the federal and state statutes, as noted earlier, require exhibition of the products "net weight" on the poultry container. According to the interpretation of a subordinate official of the Federal Department of Agriculture the term "net weight" is to be read as total net weight of the bird and the stuffing. The State's requirement of "net weight", in its statute, has been interpreted to mean that that the container must show a separate statement of the net weight both of the unstuffed bird and of the stuffed bird. The Court below found that this "was an admissible interpretation of the [state] regulation." On the other hand the alleged federal interpretation of the "net weight" term in the federal statute scarcely is entitled to such finding since the sole determination of the federal "interpretation" is based upon the action of a subordinate

federal official. Yet, review of the federal disapproval of appellants' submitted label (in conformance with the New York requirement), not sought by appellants either in the statutorily defined administrative procedure for a federal departmental hearing or by a subsequent appeal to the United States Court of Appeals, 21 U.S.C. 457. The cases holding that an aggrieved party must exhaust his administrative remedies are relevant here where the statute specifically provides for a departmental hearing with subsequent judicial review before the federal disposition can be accorded the finality and weight contended for by appellants. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U. S. 802, *reversing per curiam*, 156 F. 2d 821 (D. C. Cir.).

In addition, there is nothing in the federal statute requiring national uniformity of that term so as to indicate that it was exerting exclusive jurisdiction to exclude the state from promulgating its own "net weight" requirements. Indeed the opposite is true. There is graphic evidence, in the record, to indicate that even the federally accepted labels of appellants' products are variant in composition of their "net weight" legends, thus negating any contention that uniformity of "net weight" is required by the federal statute. Moreover, it is noteworthy that the applications forms provided by the Federal Secretary of Agriculture for label approval contains a notation that "any approval of or comment concerning this labeling material or the wording thereon ... does not excuse failure to comply with other applicable Federal or State laws ..." Where, as here, a state demands a higher standard for protection of its consumers than that required by federal law, the state law is not rendered unconstitutional. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 152. Rather, New York's statute properly "embodies a traditional state interest" in the protection of its citizens against fraud and deception and should be accorded great respect. *Rice* v. *Sante Fe Elevator Corp.*, 331 U. S. 218, 230. The appellant's poor control methods of stuffing

their turkeys as evidenced by the testimony at the hearing below highlights the state's justifications for the police power protection accorded its citizens in the New York Agriculture and Markets Law.

III

The state enactment does not place an undue burden on interstate commerce. The states may legislate with respect to "the protection of the people against fraud and deception in the sale of food products" although such matters may, in some measure affect interstate commerce." *Plumley* v. *Massachusetts*, 155 U. S. 461, 472. The only permissible constitutional limitations on this exercise of the state's police power are where such legislation discriminates "against interstate commerce or operate[s] to disrupt its required uniformity. *Huron Portland Cement Co.* v. *City of Detroit*, 263 U. S. 440, 448. Neither of the accepted limitations apply here.

Appellants have wholly failed to show that New York's statute prefers, in any respect, New York processors of stuffed turkeys over appellants. Moreover, as the Court below found, New York's requirement of the supplemental information on separate weights of turkey and stuffing, which would be satisfied by an additional label or tag, does not result in any actual or undue burden on interstate commerce. Furthermore, as discussed earlier, there is no attempt by appellee to disrupt any federal policy of national uniformity on poultry labelling since no such policy exists. Finally, it must be observed that the state regulations regulate retail sales of goods at rest within its borders. See *Schecter Poultry* v. *United States*, 295 U. S. 495. Accordingly, there is no such regulation of interstate commerce by appellee that would amount, under any circumstance, to an undue burden on interstate commerce by appellee.

IV

New York State's regulation as construed by appellee is neither arbitrary nor discriminatory, is applied equally to all processors and does not deny appellants the due process and equal protection provisions of the Fourteenth Amendment.

POINT I

The statutory Three-Judge District Court was improperly convened since appellants' complaint presented no substantial federal constitutional question but only a question of statutory construction. Direct appeal to this Court was not authorized.

A.

The appellants commenced this action in the District Court seeking a declaratory judgment prohibiting the appellee from interpreting the regulation containing the term "net weight" as set forth in the Agriculture and Markets Law of the State of New York § 193, to require a statement of the net weight of the unstuffed turkeys as well as of the stuffed birds. They alleged that appellee's interpretation of that term is in conflict with the interpretation of the identical term, "net weight", prescribed by the Federal Poultry Products Inspection Act, 21 U.S.C. § 451 *et seq.* The complaint further alleged that § 193 of the New York Statute violates appellants' rights under the commerce and supremacy clauses of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment.

Appellants requested that a three-judge court be convened pursuant to 28 U.S.C. § 2281 to hear and determine

the case. District Judge Croake, over objection of the appellee, believing that the case might be within the purview of that statute, assembled the statutory court. The decree of the three-judge court, out of "abundant caution", dismissed the complaint in the name of the three-judge court and at the same time certified that Judge Croake "individually arrived at the same conclusion that [was] reached collectively" (R 392).

This Court postponed consideration of the question of its jurisdiction of the direct appeal to the hearing on the merits. 379 U. S. 997.

The initial question, therefore, to be determined is whether this Court has jurisdiction under 28 U.S.C. § 1253 to consider the merits of this appeal taken directly from the decree of a three-judge court. Appellee contends that the case is not one for a statutory three-judge court convened pursuant to 28 U.S.C. § 2281 and that consequently this case cannot be brought here on direct appeal. *Bailey* v. *Patterson*, 369 U. S. 31, 34.

It is clear that the purpose of 28 U.S.C. § 2281 is to protect state sovereignty. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. That statute is not to be viewed "as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such." *Kesler* v. *Department of Public Safety*, 369 U. S. 153, 156. See also, *Phillips* v. *United States*, 312 U. S. 246, 250-251. Moreover, it has been held by this Court, on numerous occasions, that a disputed *substantial* federal question on constitutional grounds must be presented in order to properly convene a three-judge court. See *e.g.*, *Bailey* v. *Patterson*, *supra*, at 33.

We must now consider the nature of the present cause of action and the relief sought by the appellants in the light of these broad stated principles. *Wilentz* v. *Sovereign Camp*, 306 U. S. 573, 576.

B.

Appellants' allegation that appellee's interpretation of the New York "net weight" requirement is at variance with the Department of Agriculture's interpretation of that term as found in the Federal Act, is not a proper ground under 28 U.S.C. § 2281 for convening a three-judge court. Thus, "If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative." *Kesler* v. *Department of Public Safety, supra* at 157. This view was repeated in *United States* v. *Georgia Public Service Comm'n,* 371 U. S. 281, 287.

Similarly, in *Ex Parte Bransford,* 310 U. S. 354, this Court held that a three-judge court is not required where the issue was "merely the construction of an Act of Congress, not the constitutionality of the state enactment." *Id.* at 359.

Plainly, the thrust of appellants' contention is not directed toward a showing that the state statute is unconstitutional, since the identical term "net weight" is found in both the state and federal enactments. It is apparent that appellants must rather rely on the variant interpretations placed upon "net weight" by the federal and state authorities and argue therefrom that the federal act preempts the state legislation. This again presents no ground for convening a three-judge court.

This Court has repeatedly held that where the state statute is alleged to be inoperative because of a federal statute which preempts it, a single district court Judge may hear the case. *Case* v. *Bowles,* 327 U. S. 92; *Ex Parte Buder,* 271 U. S. 461; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50. See also *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73 (by implication); Annot. Three-Judge Court, 4 L. Ed. 2d 1931, 1962 (1960). In *Case* v. *Bowles, supra,* this Court pertinently observed that a three-

judge court was not required for example, where "the complaint did not challenge the constitutionality of the state statute but alleged merely that its enforcement would violate the Emergency Control Act." *Id.* at 97.

Here the Court below was presented not with "a sole immediate constitutional question" requiring a three-judge court, but with "issues of statutory construction" which would perhaps eventually lead to a constitutional question. *Kesler* v. *Department of Public Safety, supra* at 158. Consequently, a three-judge court was improperly convened below and no direct appeal to this Court lies from the District Court decree.

C.

Appellants' contentions under the commerce clause and the Fourteenth Amendment similarly did not require a three-judge court. The mere recitation of an alleged constitutional violation in a complaint is insufficient to mandate a statutory Court; substantial federal constitutional questions must be raised. *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 254. The lack of substantiality in a federal constitutional question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of the Court as to foreclose the subject. *California Water Service Co.* v. *City of Redding, supra* at 255. The Court below held that appellants' claims that "application of the New York Statute violates the commerce clause or the Fourteenth Amendment are insubstantial . . ." *Swift & Co. Inc. et al.* v. *Wickham,* 230 F. Supp. 398, 409. Indeed, the decision below pertinently observed that appellants' "claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked." *Swift & Co., Inc. et al.* v. *Wickham, supra* at 403. In this setting, the appellants are unable to bring this action within any of the accepted requirements for the convening of a three-judge court.

D.

Appellants now contend that the three-judge court was properly convened on the authority of this Court's decision in *Florida Lime & Avocado Growers* v. *Jacobsen*, 362 U. S. 73. That case held that the three-judge court must be assembled even where a non-constitutional attack is joined in the complaint with a constitutional one. This principle is not pertinent here where the appellants' only constitutional claims under the commerce clause and the Fourteenth Amendment are so clearly insubstantial. A three-judge court was not required to hear and determine such claims. *Ex Parte Buder*, 271 U. S. 461 (cited in *Florida Lime & Avacodo Growers, supra* at 82).

E.

Appellants' final contention is that once a hearing has been held pursuant to 28 U.S.C. § 2284 the question of the District Court's jurisdiction cannot be challenged. This argument is erroneous since the issue is not the intention behind § 2281 but rather whether there exists jurisdiction for this Court to hear a direct appeal pursuant to 28 U.S.C. § 1253. The sole determination to be made in connection with the jurisdiction of this Court here is whether a three-judge court was properly convened below. Section 1253 makes direct appeal available only when a three-judge court is "required by any act of Congress" (28 U.S.C. § 1253). The mere fact of the assemblage of the statutory court did not in and of itself authorize the direct appeal to this Court. Thus, in *Wilentz* v. *Sovereign Camp*, 306 U. S. 563, a three-judge court was convened and the court, after a hearing, rendered its final decree. In this Court the objection was pressed that the three-judge court was erroneously constituted and that a direct appeal to this Court did not lie. This Court observed that there "the issue is not one of jurisdiction of the district court as a federal court . . . [citation omitted], but whether a

final hearing by three judges is prescribed by the sections and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson,* 273 U. S. 388." *Id.* at 582.*

POINT II

The New York Agriculture and Markets Law enacted pursuant to the state police power is a valid inspection law designed to protect its citizens against false weights and measures. The declared scope and purpose of the federal Poultry Products Act, on the other hand, is concerned only with the wholesomeness of the poultry product. Moreover, since there is no showing that Congress here intended to preempt the field of weight labeling, the New York statute and regulation is not superseded by the federal enactment.

As the Court below stated "[p]rotection of the public against false weights and measures or misleading statements about them is one of the oldest exercises of governmental regulatory power" (R 379) and that "there could hardly be a fitter subject for state inspection than weights, see *Patapsco Guano Co.* v. *Board of Agriculture of North Carolina,* 171 U. S. 345, 358, 361."** We must therefore start with the assumption that this historic power of state inspection and regulation of weights is not to be superseded by the Poultry Products Inspection Act, 71 Stat. 441, 21 U.S.C. 451 *et seq.* (appellants' Appendix "A") unless the purpose of Congress to do so is clear. *Napier* v. *Atlantic Coast Lines RR Co.,* 272 U. S. 605, 611; *Allen-Bradley Local* v. *Wisconsin Employment Bd.,* 315 U. S. 740, 749.

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* The appellants have timely filed a notice of appeal to the United States Court of Appeals for the Second Circuit and their remedy would be properly preserved by dismissing the appeal to this Court. See *Wilentz* v. *Sovereign Camp,* 306 U. S. 573, 578.

** The constitutionality of New York State's Agriculture and Markets Law has been upheld as being within the state police power. *People* v. *West,* 106 N. Y. 293; *People* v. *Kibler,* 106 N. Y. 321.

It is appellants' position, which was rejected by the District Court, that Congress, in passing the Poultry Products Inspection Act (21 U.S.C. 451 *et seq.*), preempted the entire field of poultry labeling so as to preclude the State of New York, in the exercise of its police power, from imposing additional weight labeling requirements for the protection of its consumers.

In considering the question of preemption the intention of Congress to exclude the state from exercising its police power must be clearly manifested. *Napier* v. *Atlantic Coast Line, supra.* The decisions of this Court have consistently held that state statutes, otherwise valid, must be upheld unless the conflict is so direct and positive that the two cannot stand together or be reconciled or there is persuasive evidence of congressional design to preempt the field. *Head* v. *New Mexico Board,* 374 U. S. 424, 430; *Florida Avocado Growers* v. *Paul,* 373 U. S. 132, 141; *Kelly* v. *Washington,* 302 U. S. 1, 10; *Rice* v. *Sante Fe Elevator Corp.,* 331 U. S. 218, 230; *California* v. *Zook,* 336 U. S. 725, 729; *Huron Cement Co.* v. *Detroit,* 362 U. S. 440. Identity of purpose between federal and state statutes does not mean automatic invalidity of state measures. *California* v. *Zook, supra* at p. 730; *Colorado Anti-Discrimination Commission* v. *Continental Air Lines,* 372 U. S. 714. On the contrary, federalism in its practical operation, favors survival of the reserved authority of the state over matters that are the intimate concern of the state unless Congress has clearly withdrawn all state authority or the state's claim is in unmistakable conflict with what Congress ordered. *Bethlehem Steel Co.* v. *New York State Labor Relations Board,* 330 U. S. 767; *DeVeau* v. *Braisted,* 363 U. S. 144.

A.

The construction of the Poultry Products Inspection Act clearly reveals that Congress was only concerned with the marketing of wholesome, unadulterated poultry products.

The legislative findings (Sec. 2), the Congressional purpose and declaration of policy set forth in § 3, and the entire structure of the act, indisputably show that it was not the intention of Congress to "supplant all the detailed state regulation of [weight labeling] practices, particularly when the grant of power to the [Secretary of Agriculture]", *Head* v. *New Mexico Board,* 374 U. S. 242, 431, was obviously for purposes of assuring the wholesomeness of poultry products.

It is, we submit, impossible to see how a state labeling law seeking to provide additional information to its consumers as a guard against deception can in any manner frustrate or interfere with the purpose of the federal statute, nor is there anything in the statute itself or in any judicial construction of such federal statute that supports a theory of Congressional intent to preempt the field of regulation here in issue.

The federal act became effective in 1957, approximately fifty years after New York State first passed laws governing the sale of poultry and meat. The legislative findings enumerated in § 2 of that act deal with marketing of wholesome poultry products and declare this to be affected with the public interest. The policy of Congress as declared in § 3 is to prevent the movement in interstate or foreign commerce or in a designated major consuming area, of poultry products which are unwholesome, adulterated, or otherwise unfit for human food. Neither the legislative findings nor the declaration of congressional policy refer to the question of weights.

Section 4 defines important terms of the act but again no reference is made to the term "net weight". Section 5

authorizes the designation of major consuming areas within federal control.

Section 6 provides for inspection of poultry before and after slaughtering for the "purpose of preventing the entering into * * * a designated major consuming area of any poultry product which is unwholesome or adulterated * * *". A provision obviously designed to protect consumers from adulterated foods, not incorrect weights. Similarly, the provisions of § 7 also deal with wholesomeness being, concerned with sanitation, facilities and sanitary practices.

Section 8 entitled Labeling defines the items that must be included on the label of the shipping container and the immediate container. These include the official inspection mark, the approved plant number, the name of the product, a statement of ingredients and the "net weight or other appropriate measure of the contents". In the entire act containing over 20 sections, this is the only section where the necessity for disclosure of net weight is used. Approval by the Secretary of Agriculture of the written, printed or graphic matter upon or accompanying the poultry is also provided for in Section 8. The remaining sections deal with prohibited acts, methods of enforcement, penalties, reporting of violations, exemptions, imports, etc.

Read in the light of the purposes of the federal statute as set out in the statute, the provision for the statement on the label of "net weight" is clearly intended to guard against the adulteration of the poultry product after the inspection. Any other purpose would appear to be wholly alien to the language in Section 6.

Federal regulation 7 C.F.R. Section 81.130(a)(3) provides that the net weight that must appear on the immediate container of any poultry product is the net weight of the poultry product and excludes the weight of direct packaging or giblet wrapping materials. *However, this section of the*

regulations even permits the Secretary of Agriculture to approve labels which do not have imprinted the "net weight" of the product, so long as the retailer or distributor of the product "agrees in writing to the administrator to mark the true net weight on the label prior to display and sale thereof."

The lack of concern for uniformity in the federal "net weight" requirements is graphically illustrated by examining the weight legends that appear on each of appellants' labels (Appellants' Exs. B and C, R 38-39). Armour's label approved by the United States Department of Agriculture merely refers to the net weight of the product, nothing more. The Swift label, similarly approved by the United States Department of Agriculture, indicates net weight and the words "including dressing". The only uniform requirement on both approved labels is the stamp of the United States Department of Agriculture marked "inspected for wholesomeness". Yet, despite the fact that one label indicates that net weight includes the dressing and the other bears no such statement, both labels were approved by the federal department. This clearly indicates the lack of uniformity and concern for net weight requirements within the Poultry Inspection Division of the United States Department of Agriculture and the true purpose to protect the inspected poultry from subsequent adulteration.

Nothing in the federal statute precludes the supplementary information required by New York. Indeed, § 18(b) of the Poultry Products Inspection Act, providing that in carrying out the provisions of the statute the Secretary may cooperate with state agencies, shows that Congress specifically invited the Secretary of Agriculture to cooperate with the State agencies and did not, by the statute, preclude State requirements.

Furthermore, it is evident that the Secretary of Agriculture also recognized that the form and content of the

federally approved label was subject to additional state and local governmental regulations, since at the foot of the face of the application for label approval appears the following notice (Appellants' Exhibit 5, R 273-276):

> "Any approval of or comment concerning this labeling material or the wording thereon as contained in this Notice must be understood to represent the attitude of this Service only, and does not excuse failure to comply with other applicable Federal or State laws, or city or municipal regulations."

This clearly indicates that the federal government was not asserting exclusive jurisdiction so as to exclude the state from promulgating its own net weight requirements.

Thus, as the Court below pointed out: "The House Report, No. 465, 85th Cong., 1st Sess., 1957; 2 U. S. Code Cong. & Adm. News, 1957, pp. 16, 32-33, and the Senate Report, No. 195, 85th Cong., 1st Sess., 1957, say nothing on the subject save for a passing mention of a statement of "the quantity" in paraphrasing the labelling section where this clause appears" (R 387). Accordingly, it is manifest that in enacting this law, Congress did not have in mind the exclusive control of weight labelling when it used the term "net weight" in one short clause in the entire statute.

B.

There is no irreconcilable conflict between New York requirements and the federal requirements.

The New York State statute, § 193-3 of the New York Agriculture and Markets Law provides:

> "All food and food products offered for sale at retail and not in containers shall be sold or offered for sale by net weight, standard measure or numerical count under such regulations as may be prescribed by the Commissioner."

State regulation 221.40, in effect at the commencement of this action provides:

> "Meat, poultry and fish shall be sold or offered for sale as food at retail by net weight only."

This state regulation 221.40 was superseded by 221.9(c), effective March 1, 1964, which provides:

> "(c) *Meat, poultry and fish.* Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat food products, poultry (whole or parts) and all seafood except shellfish, offered or exposed for sale or sold, as food shall be offered or exposed for sale and sold by net weight. The meaning of the words meat and meat food products as used in this section is that defined in Section 96-g of the Agriculture and Markets Law."

At the conclusion of the trial appellants moved to amend their complaint to include reference to regulation 221.9(c) and such motion to amend was granted by the Court (R 248, 249).

The New York Director of Weights and Measures has interpreted this regulation to require that labels on frozen stuffed turkeys separately indicate the weight of the turkey and the total net weight of the combined product, i.e., the turkey and stuffing together (R 221). As the court below noted:

> "The history of the regulation, promulgated after a hearing by the Commissioner to consider an alternative containing an exception 'that stuffed poultry, when plainly labeled as such and with the words "including stuffing" appearing as part of the net weight marking of the combined poultry and stuffing

> may be sold or offered for sale by the net weight of the combined poultry and stuffing', leaves little doubt that this was an admissible interpretation of the regulation. We are also confident that, in view [fol. 530] of the lack of statutory definition of 'net weight', the New York courts would hold a regulation having this effect to be within the authority conferred on the Commissioner specifically by § 193-3 and more generally by 196-a. See Mounting & Finishing Co. v. McGoldrick, 294 N. Y. 104 (1945)." (R 378)

Neither the Poultry Products Inspection Act nor the regulations promulgated thereunder specifically preclude appellants from complying with the New York State weight requirement. Appellants consequently appear to base their entire case on the decision of a subordinate official who refused to approve labels submitted by appellants which *allegedly* conformed with appellee's regulations. The reasons for disapproval are set forth in a letter (R 283-284). The District Court found no valid basis for rejection of appellants' proffered labels. The trial testimony of appellants' own witnesses irrefutably established that the rejection was capricious; that the extra weighing would have no adverse effect on the wholesomeness of the turkey (R 106). The other objections were dismissed by the court as trivial. The question of a supplementary label or tag was not considered by these subordinate federal officials; no notice was given to New York by these officials or appellants so that the "cooperation" referred to in the federal statute could be accomplished.

The arbitrary and inconsistent position taken by the Poultry Inspection Division of the Department of Agriculture in this respect, is further illustrated by reference to the fact that permission had been given (though later revoked just prior to the trial of this action) by the Agriculture Marketing Service of the federal Department of Agriculture to processors of garnished ham and rock

cornish game hen to show two weights on their labels. In fact, Mr. Hauver, the Deputy Director of the Poultry Division conceded that his department's policy regarding a single weight was not irrevocable and indeed, that with more help and funds for supervision, the department could approve a label setting forth two weights (R 169-170).

Appellants' repeated references in their brief to the testimony of the State witness, John Madden, Director of Weights and Measures of the State of New York, to the effect that enforcement of the State requirement was impractical, does not present Mr. Madden's complete views on the subject because he also said that with a larger budget and more man-power New York State's requirement with respect to weights could readily be supervised and enforced (R 237).

Based upon this arbitrary unsupported determination by a subordinate official in the Poultry Products Section, appellants contend that an actual conflict exists between the state and federal weight regulations and consequently the State must give way to federal supremacy. But this is not so. The test is whether as a practical matter "both regulations can be enforced without impairing the federal superintendence of the field * * *." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U. S. 132, 142. "A conclusion that the state regulation is ousted by the federal requires, * * * a showing of conflict either in purpose or in operation between the state and federal regulations involved". *Head* v. *New Mexico Board, supra*, at 445.

In applying this test the Court below found no conflict in purpose or operation nor any congessional mandate in the statute preventing the two regulations from existing side by side. The Court concluded that merely because the Secretary of Agriculture is empowered to interpret the term "net weight", "this alone would not outlaw further statements concerning weight [by New York] so long as these do not obscure or detract from the force of the feder-

ally approved label and so long as they are not presented so as to imply federal approval" (R 389). There is no reason to say that Congress in passing the Statute and providing for the federally approved label intended to bar the states from protecting consumers by requiring additional information. Under the circumstances the difference between the view of the subordinate federal official never presented to the Secretary of Agriculture or any of his Assistants and the State Commission of Agriculture, if any, is far from irreconcilable as the Court pointed out, and as a practical matter there is no reason why both regulations cannot be enforced without impairing federal supervision.

If there is any inconsistency it is not in the statutes themselves. It arises as a result of a letter from a subordinate federal official who, *ex parte* as it were, determined that New York's requirements would be misleading, an assumption which was disowned, by appellants' own witnesses at the trial and found by the District Court to be contrary to the fact (R 387). Where, as here, the structure of the statute and regulations does not manifest a clear intention on the part of Congress to preempt the field, an arbitrary determination by a minor employee under such circumstances cannot be used to spell out such congressional intention so as to form the basis for barring the application of a New York statute. As this Court stated in *Head* v. *New Mexico Board*, 374 U. S. 424, 431-432:

> "In the absence of positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern."*

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* Appellants failed to seek a departmental hearing in accordance with 21 U.S.C. § 457(b), 7 C.F.R. § 81.130(c), at which all pertinent facts could have been presented and New York could have been represented. The District Court under the circumstances regarded the action of the subordinate federal official as not constituting any basis for the argument of federal preemption, stating that "[W]e

(Footnote continued on following page)

C.

The exercise of the police power of the State of New York through the Agriculture and Markets Law is reasonably designed to afford the consumer necessary protection against false weights and measures.

It is obvious that compliance with the state requirements gives the consumer more necessary information and thereby enables a purchaser of stuffed turkey to determine how much she is actually paying per pound. Because a state requires a higher standard for the protection of its consumers than that required by federal laws does not necessarily render the state law unconstitutional. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148, 162. It is apparent that the New York law is designed to protect its consumers against fraud and deception with respect to weights. As Mr. Justice Brennan stated in his concurring opinion in *Head* v. *New Mexico Board*, 374 U. S. 424, 445, in discussing a New Mexico law designed to protect its consumers against improper advertising:

> "Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected. *Rice* v. *Sante Fe Elevator Corp.*,

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(Footnote continued from preceding page)

think it highly unlikely that upon a departmental hearing, with New York given the notice that proper respect to its authority would demand, anyone could reasonably find that a separate statement of the weight of the unstuffed bird would be false or misleading" (R 390). Cases holding that an aggrieved party must exhaust his administrative remedies such as *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 and *Federal Power Commission* v. *Arkansas Power and Light Co.*, 330 U. S. 802, *reversing per curiam*, 156 F. 2d 821 (D. C. Cir.); are relevant here where the statute specifically provides for a departmental hearing with subsequent judicial review before the federal disposition can be accorded the finality and weight contended for by appellants.

331 U. S. 218, 230. Nor is such legislation required to yield simply because it may in some degree restrict the activties of one who holds a federal license. *Cf. Huron Portland Cement Co.* v. *Detroit*, 362 U. S. 4401, 447-448."

The need for consumer protection by New York was made abundantly clear at the trial. Mrs. E. Hendler, Senior Inspector of the New York City Bureau of Weights and Measures, Department of Markets, testified that she purchased a frozen stuffed turkey processed by one of the appellants and marked as weighing seven pounds four ounces (R 242). After thawing and weighing she found that the bread stuffing in the turkey weighed two pounds two ounces and the meat weighed five pounds two ounces (R 43); that the stuffing was "crammed in"—"extremely packed, tightly packed" (R 244) and that approximately one-half this amount of stuffing would be normal for a bird that size (R 245). Surely, under such circumstances, a label complying with federal requirements bearing only the total weight of the combined product would be misleading to the consumer and fail to provide her with the information needed to intelligently decide whether she is making a wise purchase with respect to price as well as quantity.

Appellants' method of stuffing turkeys highlights the need for more detailed information with respect to weights, than that required by the Secretary of Agriculture. There is no control over the amount of stuffing that goes into each bird (R 59, 71; 95-99). The weights of the birds vary as much as two pounds on a particular "run" on the assembly line (R 65). The stuffiing is merely inserted into the bird by a pressure device and the operator inserts as much stuffing as the cavity of the bird will take in order to conform to the natural configuration of the bird (R 71-96). Clearly this is a hit and miss process with no attention paid to the proper amount of stuffing needed for the particular weight of the individual turkey—something to which a housewife pays particular attention.

While the federal Department of Agriculture undoubtedly is well versed in the elements that are necessary to assure wholesomeness in foods, the record establishes no statutory obligation or steps to protect the consumer in this area of informing consumers of the weights of the constituents so as to guard against deception of the consumers. New York State is in the forefront of consumer protection and its Department of Agriculture is charged with the responsibility of such protection. In protecting the consumer in this area New York is in accord with the views on truth in consumer packaging as expressed by the Joint Economic Committee of Congress in its report to the President (R 160).

In the same vein, President Johnson, in a message to Congress stated:

> "We do seek packages that are easily understood and compared with respect to sizes, weights and degrees of fill . . . Package[r]s themselves should take the initiative in this effort. It is in the best interests of the manufacturer and retailer as well as the consumer." (R 158-159)

POINT III

New York State's regulation is a permissible exercise of its police power and places no undue burden upon interstate commerce.

A.

Appellants' contention that the New York regulation violates the commerce clause is clearly without merit. The commerce clause grants to the Congress power to regulate commerce between the states but the states have not been excluded from regulating matters of local concern although such matters may, in some measure, affect interstate commerce. *Minnesota Rate Cases,* 230 U. S. 352, 379-380; *Reid*

v. *Colorado,* 187 U. S. 137. This proposition is limited only in cases where "the state legislation . . . unduly burdens that commerce in matters where unformity is necessary . . ." *Morgan* v. *Commonwealth of Virginia,* 328 U. S. 373, 377. The classic illustration of a permissible subject for state regulation is in the field of police power legislation. *Head* v. *New Mexico Board,* 374 U. S. 424, 429. Thus in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U. S. 440, this Court pertinently observed:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the Country . . .' *Sherlock* v. *Alling,* 93 U. S. 99, 103." *Id.* at 443-444.

In particular, the states may legislate with respect to "the protection of the people against fraud and deception in the sale of food products" despite the fact that "such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State." *Plumley* v. *Massachusetts,* 155 U. S. 461, 472. See also *Savage* v. *Jones,* 225 U. S. 501, 525; *Patapaco Guano Co.* v. *North Carolina,* 171 U. S. 355.

Appellants clearly recognize the right of states to protect its residents from fraud and deception through passage of inspection laws. Thus they concede that neither the federal constitution nor the federal enactment "divests the state of all its authority over net weights" (App. Br. pp. 30-31). Appellants further concede that the state "retains its authority to protect the pubic against false weights or measures" (App. Br. p. 31). Accordingly, they properly recognize that New York's "net weight" regulation lies

within the valid police power of the state to protect its consumers against false weights.

Since the only constitutional limitations upon the validity of state police power legislation are that such legislation must not "discriminate against interstate commerce or operate to disrupt its required uniformity . . ." *Huron Portland Cement Co.* v. *City of Detroit, supra* at 448, appellants' contention must fail since appellee's interpretation of the term "net weight" cannot by any stretch of the imagination fall within the prohibition of the *Huron* case.

Appellants' contention that New York's regulation discriminates against interstate commerce is untenable. Their position that only intrastate processors can comply with appellee's interpretation of the weight regulation is not borne out by the record and is contrary to the decision of the District Court. Appellants wholly failed to show that New York State's regulation preferred, in any respect, New York processors of stuffed turkeys over appellants. Nor is there any proof by appellants that they cannot comply with appellee's labelling requirement, which would be satisfied by a federal supplementary label or tag as found by the District Court. There is no actual burden on the appellants resulting from New York's requirement of this supplementary label or tag simply because they may have to modify their production practices.

Their assertion that the labelling provisions in the federal regulation so occupy the field so as to preclude a state enactment on that subject repeated in this connection has been discussed under the preceding point (Br. *supra*, Point II).

Furthermore, as we have pointed out, by the explicit terms of the federal enactment there is undeniably no requirement of "uniformity of [national] regulation" (*Head* v. *New Mexico Board*, 374 U. S. 424, 429) for labeling in the instant federal statute. As the District Court found,

the New York regulation is a proper exercise of its police power and places no burden on commerce in contravention of the commerce clause. *Savage* v. *Jones*, 225 U. S. 501, 525. See also *Armour & Co.* v. *North Dakota*, 240 U. S. 510. There is no basis for challenging the finding and conclusion of the District Court.

The argument of appellants that other states *might* in the future pass different legislation cannot be maintained in the absence of any evidence of actual present conflict which can be appraised. Indeed, the possibility of contrary requirements of other states is remote. *Huron Portland Cement Co.* v. *City of Detroit, supra*, at page 448; *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520, 529; *Bob-Lo Excursion Co.* v. *Michigan*, 333 U. S. 28, 37.

B.

Appellants' contention that the New York regulation unduly burdens interstate commerce becomes even more tenuous when we consider that they are seeking to enjoin the appellee from interpreting the state regulation affecting the *retail* sale of stuffed turkeys. This Court has consistently held that the commerce clause does not extend to merchandise originating in interstate commerce after it comes to rest within the borders of the State. *E.g.*, *Schecter Poultry* v. *United States*, 295 U. S. 495; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167.

In *Armour & Co.* v. *North Dakota*, 240 U. S. 510, this Court upheld the validity of a state statute, regulating the containers of lard sold within the state, which was attacked as being violative of the commerce clause. There the Court stated:

> "It is objected that the law violates the commerce clause of the Constitution. This is certainly not true of the sale to Ladd. It was distinctly by retail and in the package of retail, not in the package of importa-

> tion *and* it is to such retail sales the statute is directed. It does not attempt to regulate the transportation to the State.
>
> Nor do we think the law is repugnant to the Pure Food & Drug Act of June 30, 1906 . . . That Act is directed against the adulteration and misbranding of articles of food transported in interstate commerce. The state statute has no such purpose; it is directed to the manner of selling at retail, which is in no way repugnant to the Federal Law . . . , and the operating of that law is in no way displaced or interfered with." *id.* at 517.

The holding of this Court in *Armour & Co.* v. *North Dakota, supra,* cogently answers the contentions of the appellants in this proceeding. In the case at bar the state statute similarly regulated retail sales and was clearly not designed to regulate the interstate aspect of the goods in transport. Moreover, the federal act in question here is directed against the transportation of unwholesome poultry through the stream of commerce. The state enactment, however, seeks only to protect its citizens from false and misleading weight statements on the poultry container. The means by which this protection is accorded the consumer is through regulation of retailers—when the poultry product is finally at rest within the State. This Court pertinently observed in *Schecter Poultry* v. *United States,* 295 U. S. 495:

> ". . . So far as the poultry here in question is concerned, the flow in interstate commerce had ceased. The poultry had come to a permanent rest within the State . . . Hence, decisions which deal with a stream of interstate commerce . . . —and with regulations of transactions involved in that practiced continuity of movement, are not applicable here . . ." *id.* at 543.

Accordingly, since the state regulation here attaches to goods at rest within its borders and does not seek to regu-

late interstate transportation of goods, appellants' contention of undue burden on commerce by appellee is patently untenable.

POINT IV

New York State's regulation as construed by appellee is neither arbitrary nor discriminatory, is applied equally to all processors and does not deny appellants the due process and equal protection provisions of the Fourteenth Amendment.

Appellants have attempted to spell out violations of the due process and equal protection clauses of the Fourteenth Amendment by arguing that the application of New York State law to out-of-state processors of frozen stuffed turkeys is discriminatory and arbitrary and that the classification made by New York, in the exercise of its police power, is not based on "some real and substantial difference which bears a reasonable and just relation to the object of the legislation * * *". The Court below disposed of this claim by appellants by stating "the claims under the Fourteenth Amendment are so patently baseless that we mention them only to show they were not overlooked" (R. 380).

It is fundamental that legislative enactments are presumed to be constitutional and, likewise, to be supported by facts known to the Legislature. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 69; *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 210; *East New York Savings Bank* v. *Hahn*, 326 U. S. 230; *United States* v. *Carolene Products Co.*, 304 U. S. 144; *Matter of Ahern* v. *South Buffalo Ry. Co.*, 344 U. S. 367. As those cases hold, while the presumption of legislative validity is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt. The party having the burden of proving the invalidity of a statute must do so clearly and must over-

come by facts judicially known or proved, not only the presumption of constitutionality, but also any state of facts which can be reasonably conceived to sustain it.

The mere fact that the enactment of a statute results in reduced income, inflicts other pecuniary injury or even makes it impossible for some people to continue in business does not establish a denial of due process or equal protection. See *Staten Island Loaders, Inc.* v. *Waterfront Comm. of New York Harbor,* 117 F. Supp. 308 (S.D.N.Y.), *aff'd* 347 U. S. 439, *rearg. den.* 347 U. S. 994; *Ferguson* v. *Skrupa,* 372 U. S. 726; *Nebbia* v. *State of New York,* 291 U. S. 502; *Kovaks* v. *Cooper,* 336 U. S. 77. Thus, it is a well-settled maxim of constitutional law that a Legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts and with the purpose of promoting the public interest. Nothing to impair the application of this maxim appears in this case. *United States* v. *Carolene Products Co., supra* at 154.

The claim of discrimination is entirely unfounded. There is absolutely no evidence that New York State is treating out-of-state processors differently than domestic processors. The law is applied to all on the same basis and there is no difference in compliance. Moreover, state statutes may create classifications or separate groupings and this in and of itself does not violate the Fourteenth Amendment. It is only "invidious discrimination" which offends the constitution and that point has not been reached in this case. *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61. The grouping or classification of processors of poultry can hardly be challenged as discriminatory. *Safeway Stores, Inc.* v. *Oklahoma Retail Grocers Assn., Inc.,* 360 U. S. 334; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151; *Goessert* v. *Cleary,* 335 U. S. 464; see also *Bowles* v. *Willingham,* 32 U. S. 503.

Appellants argue that the statute and regulations as applied by the appellee are not reasonable means for achieving the legislative aim, namely, protection of its consumers. Yet, it is difficult to envision a more appropriate method to accomplish the legislative purpose and afford the consumer the protection he is entitled to receive. There can be no question but that the legitimate aim of the State legislation is accomplished by appellants' action. See *DeVau* v. *Braisted*, 363 U. S. 144.

States have power to legislate against what any one state finds to be injurious practices in its internal affairs. *Lincoln Federal Union of A. F. of L.* v. *Northwestern Iron and Metal Co.*, 335 U. S. 525, 536. In determining that meat, meat food products and poultry when offered for sale must show the weight of the product and the net weight of the combined product, New York is obviously attempting to protect its consumers from false and misleading weights. The fact that certain other products, such as "t.v. dinners", are not placed in the same classification is of no consequence since it has been consistently held that the fact that the Legislature does not occupy the entire area raises no Fourteenth Amendment question. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379; *Gold* v. *DiCarlo*, 235 F. Supp. 817 (S.D.N.Y.), *aff'd* —— U. S. ——, 14 L. Ed. 2d 266; *Goessert* v. *Cleary*, 74 F. Supp. 735, 739, *aff'd* 335 U. S. 464.

Appellants seek to show that the inspection procedures of New York under the statute (App. br. p. 37) are inadequate in the case of stuffed turkeys by referring to the testimony of the Director of Weights and Measures of the New York Department of Agriculture and Markets that it is "impossible" to check the weight of ingredients of such combination foods as "T.V. dinners, ravioli, hash, pork and beans". The New York statute in question does not apply to such combination foods. In fact, New York regulation § 221.9(c) (App. Appendix p. 33a) specifically excludes such combination foods and classifies them as a "ready to eat meal sold as a unit for consumption else-

where than on the premises sold." These items are generally sold as a unit so that the consumer pays a fixed price for each unit and all of the units are sold at the same price. In the case of stuffed turkeys which vary in weight and are sold by the pound the requirement of separate weights applies.

Furthermore, this Court has stated that the Courts will not apply the due process or equal protection clauses of the constitution to challenge state laws, because such laws may be deemed unwise, improvident, or out of harmony with a practical school of thought. *Ferguson* v. *Skrupa*, 372 U. S. 726 (1963). Whether based on due process or equal protection contentions, it is beyond plausible dispute that this constitutional challenge is wholely devoid of any colorable merit.

CONCLUSION

Since the three-judge District Court was improperly convened direct appeal to this Court was not authorized. In any event the judgment of the District Court dismissing the complaint should be affirmed.

Dated: New York, New York, September 23, 1965.

Respectfully submitted,

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